



# The Hanjin Insolvency

## and its legal implications in German jurisdiction

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### Introduction

News spread quickly throughout the maritime world when Hanjin Shipping Co. Ltd. applied for Court Rehabilitation in Seoul on August 31<sup>st</sup>, 2016. This application of South Korea's prominent and the world's seventh largest container line was the consequence of a failed attempt to restructure its business and receive further support from creditors' banks. On September 1<sup>st</sup>, 2016, the Seoul Central District Court approved this application and ordered the opening of Rehabilitation Proceedings over the assets of Hanjin.

These proceedings – comparable to the US "Chapter 11"-proceedings – are a kind of protective insolvency proceedings in which the so-called "Receiver" is given the option to consider a possible continuation of the debtor's business together with the creditors. As Receiver, the Court appointed Mr Tae-Soo Seok, CEO of Hanjin. Creditors were requested to file their claims against Hanjin to the Court within a certain time limit, which by a court order of September 12<sup>th</sup>, 2016 has meanwhile been extended to October 25<sup>th</sup>, 2016. Until November 25<sup>th</sup>, Hanjin will have time to submit a restructuring plan. Then, the Court will decide whether it will place the company under creditor protection or liquidate it.

The news about Hanjin's insolvency soon led to turmoil in global trade. International supply chains were disrupted when Hanjin's own fleet as well as chartered vessels were denied access to ports worldwide or to discharge cargo. This was due to market participants fearing the debt-ridden carrier's inability to pay terminal fees, operators and pilots, leaving vessels idle at sea or stuck at port, some arrested by creditors.

By a recent decision dated September 19<sup>th</sup>, 2016, the Rehabilitation Court ordered Hanjin to return the chartered ships to their owners and to sell as many of its own ships as possible. This can be seen as the strongest signal yet that Hanjin will be either liquidated or at least turned into a much smaller company.

### 1. Consequences for German owners

Owners who have chartered out their vessels to Hanjin must reckon that their charterpartys – in most cases long-term time charters - will very likely not be complied with. The fate of the charterparty depends on its individual conditions as well as the Korean proceedings. In general, contracts are not automatically terminated by the commencement of the Rehabilitation Proceedings.

In terms of outstanding payments, in particular charter hire, owners will have to file their claims in the Korean Rehabilitation Proceedings, whereas it remains unclear in which amounts the creditors will be distributed funds at the end of the proceedings - if any at all.

The Korean insolvency proceedings and its court orders are generally recognised in Germany in terms of Section 343 para. 1 of the German Insolvency Code (InsO). Thus, in Germany the initiation of court proceedings against Hanjin for outstanding claims would be inadmissible after the beginning of the Korean proceedings. For the assertion of claims against Hanjin it is imperative that creditors register their claims with the competent Korean Court within the set time limit, irrespective of their contractual choice of law. This however does not automatically mean that the claim itself is also subject to Korean law. Whether or not the claim is justified under the individually agreed law will be reviewed by the Receiver and other creditors after the claims registration.

### 2. Standing in for Hanjin's debts?

According to German law, there is no legal reason why the German owners should stand in for third party claims against Hanjin. This particularly applies to unpaid bunker claims for which German law (if applicable to the bunker claim) would not grant a maritime lien. In German law, ship arrests may only be targeted against the debtor's assets. Vessels chartered by Hanjin are not assets of Hanjin.



Nevertheless, it cannot be excluded that the fleet of German owners will still be the target of Hanjin's creditors, trying to seize and arrest the vessels in Germany and elsewhere. As the time charterer is generally responsible for the bunker purchase, German owners did not have to fear seizure of their vessel itself (unless a maritime lien existed), but the seizure of the bunker within it. Such "bunker arrest" had about the same effect as an arrest of the vessel, which would not be able to depart under such circumstances. However, due to a court order of the Local Court of Hamburg dated 14 September 2016, such measures of enforcement against Hanjin's own assets are no longer allowed.

### 3. Effects of recent Hamburg court order: Is Germany now "safe port" for "Hanjin vessels"?

On September 14<sup>th</sup>, 2016, the Local Court of Hamburg (file no. 67a IE 1/16) ordered that all measures of enforcement against the assets/property of Hanjin on German territory are no longer permitted and that measures already initiated shall be repealed. This order was based on a respective protective order by the Korean Rehabilitation Court, forbidding enforcement measures against Hanjin's assets in Korea. Upon application of the Korean Receiver, the German court extended these protective measures to German territory, based on Sections 21, 344 para. 1 InsO.

In the light of this decision, the question arises whether German ports can now be considered "safe ports" for "Hanjin vessels".

On the one hand, regarding vessels, bunker and other assets which are legally owned by Hanjin itself, this question can be answered with "yes". Any attempted measure of enforcement against these assets would be held invalid by German courts due to the recent decision.

On the other hand, regarding vessels which are only chartered by Hanjin, but legally owned by others, one cannot deem German ports as "safe" from possible enforcement actions against them. This is because to these vessels, the protective Hamburg court order does not apply, thus, there is no prohibition of enforcement measures against these vessels. For these, it remains possible that creditors of Hanjin are secured with maritime liens which entitle them to seize and arrest the (third party-owned) vessel for Hanjin's debts. In terms of German law, such maritime liens are given e.g. for outstanding wages of the master and crew, public charges including port and pilotage dues, certain non-contractual damage compensation claims, claims for salvage, general average and wreck removal and social security claims (Section 596 of the German Commercial Code, HGB). Other jurisdictions even provide for maritime liens based

on bunker supply, repair claims and other grounds. Thus, if Hanjin has failed to pay for such a secured claim, and the creditor can prove this maritime lien before the competent German court, would still be entitled to arrest the third party's vessel even in German ports. The Hamburg court order of September 14<sup>th</sup>, 2016 would not hinder this.

### 4. Cargo interests affected

Not only the vessel owners face problems with Hanjin nowadays, but also the owners of cargo onboard the vessels. They must cope with the fact that they will only be granted access to their goods if they are willing to accept further costs and effort. Whereas most Bills of Lading provide for a „Freight Prepaid“-clause, granting the recipient a delivery claim, in fact nobody will be willing to advance performance without having been paid. Therefore, cargo owners must expect that terminals or other freight forwarders involved in the pre- and post-carriage of the containers will try to put through their outstandings against Hanjin by demanding prepayment and factually exercise a right of retention or lien. Whether or not they are entitled to do so depends on the applicable law of the respective contract of carriage and to what extent this allows for a seizure for old receivables. In practice, cargo interests will pay (again) to get access to the urgently needed goods. Such payment will and should be made under protest and should be covered by many cargo transport insurances.

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